



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

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MUR 5712

)

Senator John McCain

)

Governor Arnold Schwarzenegger

)

STATEMENT OF REASONS OF COMMISSIONER HANS A. von SPAKOVSKY

(Participation of Federal candidate in State candidate fundraising events)

I dissented in this matter because I do not agree that Senator McCain violated 2 U.S.C. § 441i(e). My colleagues agreed with the conclusion of the Office of General Counsel ("OGC") that Senator McCain illegally solicited non-Federal funds in connection with a fundraiser for Governor Schwarzenegger and the California Republican Party, despite the fact that Senator McCain never asked anyone to give any funds to either Governor Schwarzenegger's campaign or the California Republican Party. The invitation to the event listed Senator McCain only as a "Special Guest." It specifically stated that "the solicitation for funds is being made only by Californians for Schwarzenegger and the California Republican Party" and "Senator McCain is not soliciting individual funds beyond federal limit, and is not soliciting funds from corporations or labor unions." Notwithstanding these disclaimers, the solicitation on the written invitations was "imputed" to Senator McCain.

I. BACKGROUND

My colleagues concluded that the limitations on Senator McCain's ability to participate in the fundraising event at issue were clear, and Senator McCain did not adhere to the Commission's prior instructions. I acknowledge that the analysis applied in this matter and the result reached by my colleagues may be consistent with *Advisory Opinions 2003-03 (Cantor)*, *2003-36 (Republican Governor's Association ("RGA"))*, and *2003-37 (Americans for a Better Country ("ABC"))*, although the instructions in those Advisory Opinions are not as clear as my colleagues and OGC contend. I was not on the Commission at the time those Advisory Opinions were considered, and had I been, I would have urged a different approach. Nonetheless, the specific question raised by this matter involves the application of what OGC identifies as the third rule of this trio of Advisory Opinions:

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However, if a written solicitation in connection with the election of state candidates explicitly asks for donations of funds in amounts exceeding the Act's contribution limits or from prohibited sources, then a Federal officeholder or candidate may not appear in the solicitation regardless of whether there is an express statement limiting the Federal officeholder or candidate's solicitation to funds that comply with the amount limits and source prohibitions of the Act.

Factual and Legal Analysis in MUR 5712 at 7.

The Commission should have taken this opportunity to disavow this rule, which is supported neither by the law nor our regulations, rather than affirm it. Senator McCain's disclaimer sufficiently established that he was not soliciting any Federally impermissible funds in connection with the event and he made no solicitation at the event itself. The solicitation should not be imputed to him, and on this basis I would find no violation of 2 U.S.C. § 441i(e)(1).

II. THE MECHANICS OF *CANTOR* AND *RGA*

The basic principle upon which *Cantor* and *RGA* is built is that "the scope of a covered person's potential liability under section 441i(e)(1) and [11 CFR] 300.62 must be determined by his or her own speech and actions in asking for funds or those of his or her agents, but not by the speech or actions of another person outside of his or her control." *Advisory Opinion 2003-03*; see also *Advisory Opinions 2003-36* (same) and *2003-37* (same). From this starting point, the Commission drew lines between "general" and "specific" solicitations, and between pre-event (written) publicity and the event itself.

The Commission concluded that a "general solicitation" (i.e., a solicitation that does not request a specific amount) of funds by a Federal candidate or officeholder at a state candidate fundraising event, if disclaimed as set forth in *Cantor*, would not violate the soft money fundraising restrictions at 2 U.S.C. § 441i(e)(1). The Federal candidate or officeholder may also agree to appear on any pre-event publicity, with an appropriate *Cantor* disclaimer, provided that any solicitation on the publicity is only a "general solicitation." See *Factual and Legal Analysis in MUR 5712 at 6* (second rule). The Federal candidate's or officeholder's agreement to appear on the written publicity "imputes" the solicitation to him, but the *Cantor* disclaimer is sufficient to fence off the Federal candidate from that solicitation, and keep his activity within the boundaries of 2 U.S.C. § 441i(e)(1). In other words, the Federal candidate or officeholder may generally solicit non-Federal funds for a State candidate, as long as he specifically states (i.e., clarifies) that he is not soliciting any Federally impermissible funds.

The rules are somewhat different, though, when "specific solicitations" (i.e., solicitations that request a specific amount) are at issue. If the specific amount solicited by the Federal candidate at the fundraising event, or on the pre-event publicity, is within the Federal amount limitations and source prohibitions, then the Federal candidate is in compliance with 2 U.S.C. § 441i(e)(1). No *Cantor* disclaimer is needed in this situation.

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See Factual and Legal Analysis in MUR 5712 at 6 (first rule). However, if the specific amount solicited is above the Federal amount limitations, or is directed at a prohibited source, the Federal candidate or officeholder finds himself in a quandary.

If the Federal candidate participates in a state candidate fundraising event, and does not solicit non-Federal funds beyond the limitations of 2 U.S.C. § 441i(e)(1), the Federal candidate will *not* be deemed to have violated the law simply because some other person at the event made a specific solicitation of non-Federal funds beyond the limits of Federal law.¹ The same does not hold true, however, with respect to the pre-event publicity. The Federal candidate's agreement to appear on the written notice, along with the specific solicitation beyond the Federal limits, results in that specific solicitation being "imputed" to the Federal candidate, as in the case of a general solicitation, but unlike a general solicitation, the imputation of this specific solicitation cannot be "cured" with a *Cantor* disclaimer. *See Advisory Opinion 2003-36 fn. 9* ("Although *Advisory Opinion 2003-03* might be read to mean that a disclaimer is required in publicity or other written solicitations that explicitly ask for donations 'in amounts exceeding the Act's limitations and from sources prohibited from contributing under the Act,' that was not the Commission's meaning. The Commission wishes to make clear that the covered individual may not approve, authorize, agree, or consent to appear in publicity that would constitute a solicitation by the covered person of funds that are in excess of the limits or prohibitions of the Act, regardless of the appearance of such a disclaimer.").

I cannot square this rule with *Cantor's* basic premise – that liability is determined by one's own speech and actions – or the Commission's conclusion that a general solicitation of non-Federal funds may be "cured" with a clarifying disclaimer. If a general solicitation for non-Federal funds is permissible as long as it is properly disclaimed, on the grounds that one is only responsible for his own speech and actions, then it makes no logical sense that a Federal candidate cannot similarly distance himself from *someone else's* Federally impermissible specific solicitation on a written invitation – as Senator McCain properly attempted to do.²

Consider how these rules very conceivably operate in practice. Some states, such as Virginia and Utah, have no contribution limits. Thus, in many instances, there is no need to indicate on an event invitation how much money an attendee may contribute. A Federal candidate could appear on the invitation and give the keynote address for an event that generates nothing but \$100,000 contributions, and as long as only a general solicitation was made, and the Federal candidate included the appropriate *Cantor*

¹ See *Advisory Opinion 2003-36* ("[I]f the covered individual makes a speech without asking for donations to RGA, he does not need to issue a disclaimer stating that he is not raising funds outside the limitations or prohibitions of the Act, even though speeches by others solicit such funds"); *Advisory Opinion 2003-03* ("a covered person may participate in any activities at such fundraising event provided the covered person does not solicit funds outside the Act's limitations and prohibitions").

² I agree that a Federal candidate or officeholder cannot *himself* solicit Federally impermissible funds and cure his own solicitation with a disclaimer. Permitting such mixed signals and double-talk would eviscerate the soft money solicitation restrictions. However, this is not the situation here.

disclaimer, he will be fully compliant with Federal law. However, if that same Federal candidate agrees to speak at an event for a State or local candidate in a state such as California, which has contribution limits that are considerably higher than the Federal limits, and the event organizers request amounts up to those limits on the invitation, the Federal candidate will violate the law even if he disclaims any solicitation of Federally impermissible funds, or makes no solicitation at all, simply by virtue of his agreement to appear on the invitation.

III. SENATOR MCCAIN AND GOVERNOR SCHWARZENEGGER

In the matter at hand, Senator McCain agreed to be the "Special Guest" at a non-Federal fundraiser for Governor Schwarzenegger and the California Republican Party. (This means he was the featured speaker at the event.) The written invitation to the event included specific solicitations beyond the Federal limits, albeit consistent with California law. The following disclaimer appeared in two places on the invitation, printed inside a box so that no one could miss it:

We are honored to have Senator John McCain as our Speaker for this event. However, the solicitation for funds is being made only by Californians for Schwarzenegger and the California Republican Party. In accordance with federal law, Senator McCain is not soliciting individuals funds beyond federal limit, and is not soliciting funds from corporations or unions.

The second sentence of this disclaimer makes perfectly clear that Senator McCain was *not* soliciting any funds. For the sake of attempting to satisfy *Cantor*, however, a sentence that implied something that was not true was added stating that Senator McCain was only soliciting Federally permissible funds.³ At the event itself, Senator McCain did not solicit any funds. *See Response of Trevor Potter, September 20, 2006* ("as here, the officeholder is not actually soliciting any funds at all but merely speaking at the event"). The fact that Senator McCain never actually asked anyone for any money in connection with this fundraising event, but felt compelled to include disclaimer language indicating otherwise, reveals the shortcoming in the Commission's approach to these matters. Senator McCain *should* have been permitted to simply state that he was not soliciting any funds at all in connection with the event, and that *should* have been the end of this matter.

My colleagues' approach does not recognize a way of advertising a Federal candidate's non-fundraising speech on pre-event publicity in which *only the host* specifically solicits Federally impermissible amounts. As a result, the Commission must

³ *Cantor* states that an appropriate disclaimer is "I am asking for a donation of up to \$2000 per election from an individual's own funds [or up to \$5,000 per election from a multi-candidate political committee or a political party committee]. I am not asking for funds from corporations, labor organizations or minors." *RGA* approves "I am asking for a donation of up to \$5,000 per year. I am not asking for funds from corporations, labor organizations, or other Federally prohibited sources." Neither opinion specifically contemplates a situation like the one at hand, in which the Federal candidate never actually solicits any funds.

effectively state that it disbelieves the disclaimer placed on the written invitation and Senator McCain's representations. Then, it must hold Senator McCain responsible for what was obviously *someone else's* solicitation of non-Federal funds.

Finally, the Commission places organizers of State candidate fundraising events in the rather odd position of choosing between publicizing on their invitations who the Featured Speaker will be (assuming that speaker is a Federal candidate or officeholder), and telling potential attendees the cost of the event (assuming that cost is beyond the Federal limitations). Both pieces of information are factual matters, and the Commission's position reduces the total amount of information the public receives. In light of the applicable rules, perhaps the only viable option for these organizations, if they wish to avoid violating Federal law, is to keep the identity of their Featured Speaker a secret.⁴ Needless to say, this is a rather absurd result.

IV. CONCLUSION

The only upside (if it can be called that) to this matter is that the rules for Federal candidate or officeholder participation in State candidate fundraising events are now consolidated and restated with clarity, although I do not believe we have found the optimal answer. Individuals are advised to adhere to the guidelines set forth in the *Factual and Legal Analysis* adopted by the majority of Commissioners to avoid being found in violation of the law. However, I urge the Commission to reconsider its approach to these matters in the future and work to resolve the inconsistencies I have noted.

March 2, 2007


Hans A. von Spakovsky
Commissioner

⁴ In the past, at least one organization has successfully navigated these treacherous waters. In one envelope, the organization sent announcement cards to donors stating that a certain Federal candidate or officeholder would be the Special Guest or Featured Speaker or Honored Guest at an upcoming event. The announcement card made no mention of money (or, it could have made a general solicitation and included a *Cantor* disclaimer). Then, in a separate envelope, the same donor received the traditional contribution/RSVP (reply) card, which included a specific solicitation of non-Federal funds beyond the Federal limits, but made no mention of the Federal candidate who was appearing. Neither piece violated the *Cantor/RGA* rules. The fact that the Commission's complex rules can be avoided simply by doubling your printing and postage costs shows that these rules emphasize form over substance.